82-888

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No:_____

UNITED STATES SUPREME COURT

October Term, 1982

DR. JACQUELINE S. HART,
Plaintiff-Appellant

versus

THE UNIVERISITY OF TEXAS, HOUSTON, M.D. ANDERSON HOSPITAL and TUMOR INSTITUTE, ET AL,
Defendants-Appellees

APPEAL FROM THE FIFTH CIRCUIT COURT OF APPEALS

APPLICATION FOR WRIT OF CERTIORARI

W. Patrick Resen, Esquire
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QUESTIONS PRESENTED

I.

WHETHER APPELLANT ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATION.

II.

ASSUMING THAT APPELLANT ESTABLISHED A PRIMA FACIE CASE OF DISCRIMINATION, DID APPELLEES REBUT THE PRESUMPTION OF AN UNLAWFUL DISCRIMINATION.

I.

PARTIES

APPELLANT:

DR. JACQUELINE S. HART

APPELLEES:

UNIVERSITY OF TEXAS AT HOUSTON

M.D. ANDERSON HOSPITAL AND TUMOR INSTITUTE

II.

JURISDICTION

Appeal of Judgment from United States Court Of Appeals For the Fifth Circuit.

III.

REFERENCE TO OPINION

1) United States District Court For The Southern District of Texas, Houston Division; Civil Action Number H-79-915; Judgment Entered March 30, 1981.

2) United States Court Of Appeals For The Fifth Circuit; Number 81-2156; Judgment Entered August 23, 1982.

IV.

STATEMENT OF THE CASE

This matter proceeds from Appellant's Title VII action, contending that Appellees unlawfully denied her promotion in employment as a research scientist based on sexual

discrimination. The denial of promotion effectively terminated her employment under the terms of the position established by Appellees.

Appellant's position with Appellee was as a cancer research scientist, and Assistant Professor of Medicine. Her duties included patient care, research, teaching, and the typically associated academic committees, societies, and review groups.

Appellant developed original research methods (protocols) receiving recognition from her peers for her basic research work, and publication of the same. Appellees acknowledged her work, and incorporated the same into their own research projects. Despite Appellant's performance and work product, Appellee's review committee did not recommend her promotion. Having not been promoted,

Appellant's position of employment terminated, and her only recourse with Appellees was a terminal one year assignment.

Appellant contentions are that particular administrators of Appellees intentionally sought to mimimize her contribution(s), and instead depriciated her value to the educational institution, and its programs. These intentional acts and conduct direct resulted from personal motivation to discriminate against Appellant as a female member of the staff.

Further, that by discriminating against Appellant, and causing her termination from the staff, Appellant's research projects thereafter became Appellee's property. In essence, by insuring Appellant's employment failure, Appellees gained control over Appellant's

research and adopted the same as their own without professional credit to Appellant.

Appellant clearly set forth these contentions by a preponderance of the evidence at Trial, and the burden therefore fell upon Appellees to rebutt the presumption of an unlawful discrimination. Appellees have not met any part of its burden in this regard, and thus Appellant's case must be upheld as a matter of law, or the case returned to the District Court for a further hearing on the issue of fact.

W PATRICK RESEN
Attorney for Petitioner

APPENDIX 1

IN THE UNITED STATES COURT OF
APPEALS
FOR THE FIFTH CIRCUIT

No 81-2156

DR. JACQUELINE S. HART,

Plaintiff-Appellant,

versus

THE UNIVERSITY OF TEXAS,
HOUSTON, M.D. ANDERSON
HOSPITAL and TUMOR INSTITUTE,
ET AL,

Defendants-Appellees.

Appeal from the United States District
Court for the Southern District of
Texas

(August 23 , 1982)

Before THORNBERRY, REAVLEY and GARWOOD,
Circuit Judges.
PER CURIAM:

This appeal is taken from a decision of the district court in favor of the

Univerisity of Texas, M.D. Anderson Hospital and Tumor Institute, its Board of Regents and various faculty members, Defendants-Appellees, in an action brought under Title VII of the Civil Rights Act of 1964 by Dr. Jacqueline Hart, Plaintiff-Appellant, a physician formerly employed by M.D. Anderson. Hart alleged that she was denied a promotion and was constructively discharged from her position as assistant professor of medicine because of her sex. She also claimed that the appellees converted a research program belonging to her, published portions of her work without giving her recognition, and slandered her character by giving false and malicious employment references subsequent to her departure from M.D. Anderson. Following a trial on the merits, the district court held that Hart failed to establish a prima facie case of sex discrimination. The court found that she was not

promoted because she lacked the requisite qualifications and that she was offered a one-year terminal contract because of her unsatisfactory work performance. It also held against Hart on the conversion and slander claims. We affirm.

Jacqueline Hart was hired by M.D. Anderson in 1966 as a fellow in the Department of Developmental Therapeutics. Initially her responsibilities at the hospital were in the area of patient care. Eventually she became involved in research and developed a research program of her own. As a result, in 1969 she was promoted to the rank of Assistant Professor. In 1975, 1976, and 1977 Hart sought to be promoted to the position of Associate Professor. Each time her department head, Dr. Emil Freireich, recommended her for the position to the appropriate review committees and each time the recommendation was rejected.

Following her last unsuccessful attempt at promotion, Hart's work performance at M.D. Anderson rapidly deteriorated. Consequently in July 1977 Dr. Freireich requested that Hart turn over her research program to Dr. Barthel Barlogie, a male physician and research fellow who had worked under Hart's supervision. Dr, Barlogie was promoted to assistant professor approximately one year after Hart's departure from M.D. Anderson and promoted to associate professor in 1980. In August 1977 Hart was offered a terminal one-year appointment in the form of a staff position as Assistant Internist at M.D. Anderson. She did not accept the position, which she considered a demotion, and ceased attending to her regular duties and responsibilities. In December 1977, she was advised by M.D. Anderson that her failure to accept the one-year position was being interpreted as a rejection.

The plaintiff in a Title VII case bears the burden of proving discrimination by a preponderance of the evidence. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981). To establish a prima facie case, the plaintiff must show "that she applied for an available position, for which she was qualified, but was rejected under circumstance which give rise to an inference of unlawful discrimination." Id. at ____, 101 S. Ct. 1094. If the plaintiff is successful in proving a prima facie case, the burden shifts to the defendant to produce evidence of some "legitimate, nondiscriminatory reason" for the employee's rejection. Id. at ____, 101 S.Ct. at 1094. The defendant need not convince the trier of fact but need only raise a genuine issue of material fact. Id. at ____, 101 S.Ct. at 1094. If the defendant meets this burden of production

then the case goes to the tirer of fact, and the plaintiff retains the "ultimate burden of persuading the court that she has been the victim of intentional discrimination." Id. at ____, 101 S.Ct. at 1095.

FAILURE TO PROMOTE

Hart testified that she applied for the position of associate professor, that despite her qualifications she was rejected, and that Dr. Barlogie, a male physician, similarly qualified, was later promoted to the position. She also claimed that her department head, Dr. Freireich, told her on more than one occasion that he could not support a woman over a man.

While Hart's qualifications appear impressive, she admitted that she had little or no experience in teaching at

the graduate level, one of the requirements for promotion to associate professor. Also, it appears from her testimony that she was not certified by the appropriate specialty board. Although certification is not required for promotion, it is strongly recommended. Hence, the district court's conclusion that Hart did not prove a prima facie case of sex discrimination because she was not qualified for promotion is supported by the evidence.

Even if Hart had been able to make a prima faacie showing that she was qualified for promotion, the defendants introduced sufficient evidence to rebut Hart's claim of discrimination. Dr. Freireich testified that Hart's qualifications were weak in several major areas. He explained that Hart's publication record in peer reviewed journals was too low to justify

promotion, that her patient care responsibilities had begun to diminish, and that her graduate level teaching experience was insufficient. He also stated that Hart's research program was only part of a larger funded project and that she had never successfully competed for independent research grant funding. While Dr. Freireich admitted that he had three times recommended Hart for promotion, he stated that he had done so reluctantly because he did not wish to stand in the way of her career.

CONSTRUCTIVE DISCHARGE

Hart claims that by taking away her research program and offering her a terminal year contract, M.D. Anderson constructively discharged her from her position as assistant professor. "Constructive discharge will be found where an employer has made working

conditions so difficult that a reasonable person would feel forced to resign." Meyer v. Brown & Root Constr. Co., 661 F.2d 369, 372 (5th Cir. 1981). The district court did not make any specific findings of fact on this issue. However, even if we assume that Hart was constructively discharged from her position, there is no evidence to show that the discharge was discriminatory. Hart admitted at oral argument that it was M.D. Anderson's policy to terminate a professor who had not moved from assistant to associate after a certain number of years. In addition, the appellees introduced evidence that Hart's work performance had significantly deteriorated after she failed to be promoted and that she was no longer performing satisfactory work.

CONVERSION

Hart claimed that appellees

published at least three articles containing scientific data prepared by her without giving her recognition. She claims that the deposition of her colleague, Dr. Keating, would havesubstantiated her claim, had it been admitted into evidence. The deposition was properly excluded however, since no allegation was made that the witness was unavailable. See Fed. R. Civ. P. 323. Moreover, Dr. Freireich, one of the authors of the contested publications, flatly refuted Hart's allegation. He testified that he was the sole author of the publication and that he did not use Hart's research. Hart also claims that M.D. Anderson deprived her of her property without due process by taking away her research program. She claims that she had a property right in the program because of the time and effort she had invested in it. There is no evidence of misuse of her work. the

findings of the district court are supported by the evidence.

SLANDER

Hart's claim that she was unable to obtain other employment because appellees gave her false and malicious employment references is also unsubstantiated. Reference was made at the trial to a letter received by Hart's attorney in which M.D. Anderson's vice president, Dr. Hickey, allegedly stated that he would have to inform prospective employers of the pending discrimination suit. However, the letter was not introduced into evidence. Dr. Hichey took the stand and denied that he ever informed prospective employers about the suit. He stated that he had recommended Hart as an acceptable candidate. Under the circumstance, the district court made a reasonable credibility choice which we

will not disturb on appeal.

The decision of the district court is affirmed in all respects.

AFFIRMED.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

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DR. JACQUELINE S. HART,
Petitioner

VS.

THE UNIVERSITY OF TEXAS, HOUSTON,
M.D. ANDERSON HOSPITAL AND
TUMOR INSTITUTE, ET AL,
Respondents

* * * *

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * * *

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IN THE
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Respondents, The University of Texas, Houston, M.D. Anderson Hospital and Tumor Institute, et al, respectfully urge that the Petition for Writ of Certiorari be denied for the reasons set forth below:

STATEMENT OF ISSUES

1. This petition should be denied because Petitioner failed to establish a prima facie case of discrimination.

2. This petition should be denied because Respondent clearly articulated legitimate non-discriminatory reasons for not promoting Petitioner, assuming arguendo she has established a prima facie case.

STATEMENT OF THE CASE

Petitioner brought this suit in the United States District Court for the Southern District of Texas,

Houston Division (Civil Action No. H-79-915). A trial before the court was held on March 24, 1981. On March 30, 1981, the court concluded that Petitioner had failed to prove a prima facie case of sex discrimination or retaliation and had, therefore, failed to establish that the Respondents violated her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. The court further concluded that Petitioner failed to establish a cause of action under the Texas common law for either conversion or slander. Final judgment was entered March 30, 1981.

Petitioner filed notice of appeal to the Court of Appeals for the Fifth Circuit on April 21, 1981, No. 81-2156. The judgment of the district court was affirmed by the Fifth Circuit on August 23, 1982.

The district court correctly ruled that Petitioner failed to prove that she was denied promotions by Respondents based on her sex, female. Petitioner further failed to demonstrate she is as qualified or more qualified than any males that were promoted. Failing such proof, Petitioner has obviously failed to show a prima facie case of sex discrimination. *Texas Dept. of Community Affairs v. Burdine*, ____U.S.____. 101 S.Ct. 1089 (1981); *McDonald Douglas v. Greene*, 411 U.S. 792, 93 S.Ct. 817 (1973). The Court of Appeals held that there was not sufficient evidence to establish a prima facie case of discrimination based on sex. Even if Petitioner had established a prima facie case, the court of appeals found that there was sufficient evidence to rebut Petitioner's claim of discrimination.

Rule 52 of the Federal Rules of Civil Procedures states that "findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." The trial court had full opportunity to review the witnesses and evidence presented by both

parties and based on that opportunity, the district court found that there was insufficient evidence to establish a prima facie case of discrimination. While Plaintiff may disagree with the findings of the trial court and the inferences raised therein, her disagreement does not provide a basis for overturning the decision of the trial court. The Court of Appeals did not find that the findings made by the trial court were clearly erroneous, which is the standard of review the court of appeals is to follow, as stated in this Court's decision in *Pullman-Standard v. Swint*, 102 S.Ct. 1781 (1982).

The petition for writ of certiorari does not suggest that the decision of the Court of Appeals for the Fifth Circuit is in conflict with the decisions of any other federal court of appeals. The issues presented have been settled by the Supreme Court opinions in *McDonnell Douglas v. Green, supra* and *Burdine, supra.* None of the reasons contemplated or suggested by Rule 17 of the Supreme Court Rules is present to justify the grant of certiorari.

For the reasons stated, this petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that 3 true and correct copies of the foregoing Opposition to Petition for Writ of Certiorari have been sent to W. Patrick Resen, Attorney at Law, 2001 Salvio Street, Suite 13, Concord, California 94520, by United States Postal Service, Certified, Return Receipt Requested, this _____ day of January, 1983.

_____

DAVID R. RICHARDS